

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-222326

DATE: April 3, 1986

MATTER OF: Tom Mistick & Sons Inc.

DIGEST:

The protester's bid was properly rejected where the bid bond was required to be 20 percent of the bid price, and the protester's bond stated the penal sum to be 20 percent of the bid price, but stipulated that the amount was not to exceed a specific amount which was less than 20 percent of the bid price and also less than the difference between the protester's bid and the next low acceptable bid.

Tom Mistick & Sons, Inc. protests the rejection of its bid under invitation for bids No. DAHA36-85-B-0029, issued by the U.S. Property and Fiscal Office for Pennsylvania to acquire roofing repair services at the Pittsburgh Air National Guard Base. The invitation required bids to include a bid guarantee equal to 20 percent of the offered price. While Mistick's bid included a bid bond for 20 percent of the bid price, the bond stipulated that the penal amount was not to exceed \$47,767, which was almost \$6,000 less than 20 percent of Mistick's bid price of \$268,579. Since the specified penal sum was also less than the difference between Mistick's low bid and the next low bid, the agency rejected Mistick's bid as being nonresponsive to the bid guarantee requirement. We dismiss the protest.

The protester contends that it obtained the bid bond based on its intended bid price of \$238,833, of which the stipulated penal sum was 20 percent. The agency, however, issued an amendment increasing the scope of work that Mistick apparently received after it already had submitted its bid. The protester asked the contracting officer how to amend its bid, and was told that it could acknowledge the amendment and change its bid price in a separate letter. Mistick submitted such a letter, but failed to submit a bid guarantee reflecting the increased bid price. Mistick contends that the agency failed to adequately

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to revise its bid, and further contends that the bid bond clearly manifested the surety's commitment to be liable for 20 percent of the bid price notwithstanding the specific penal sum.

First, the burden is on the bidder to assure that its bid conforms with the invitation's requirements. E.g., Fraser-Volpe Corp., B-213910, Dec. 28, 1983, 84-1 CPD ¶ 35. The requirement for a bid guarantee in the amount of 20 percent of the bid was clearly stated, and the agency did not misadvise the bidder about the necessity of complying with the requirement. Therefore, Mistick should have known that an increase in its bid price would require a corresponding increase in its bid guarantee; the agency was under no obligation to remind Mistick of this fact.

Regarding the adequacy of the bond, the purpose of a bid guarantee is to secure the surety's liability to the government for excess procurement costs in the event the bidder fails to honor its bid. See Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. When required, a bid guarantee is a material part of the bid, and therefore a bond by its terms must clearly establish the requisite liability of the surety or the bid must be rejected as nonresponsive. Allen County Builders Supply, 64 Comp. Gen. 505 (1985), 85-1 CPD ¶ 507.

The question presented where a bond contains any defect is whether the government materially obtains the same protection under the bond actually submitted as it would if the bond complied with the invitation in all respects. Id. In this regard, the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.101-4(b) (1984), provides that a bond is sufficient where the penal sum is equal to or greater than the difference between the defective bid and the next low acceptable bid.

At best, Mistick's bid bond was ambiguous regarding the extent of the surety's liability, and did not clearly establish that the surety would be liable for any amount exceeding the specific penal amount of \$47,767. At worst, the specific penal amount represented the absolute limit of liability to which the surety agreed to be bound. Under

these circumstances, the government clearly lacked the same protection as where the stipulated penal sum equaled 20 percent of the bid price or where the extent of liability simply was stated as 20 percent of the bid price without a specific amount. Compare Hydro-Dredge Corp., B-214408, supra (upholding the rejection of a bid where the authority of the surety's attorney-in-fact was limited to assuming liability for less than the required penal amount) with Allen County Builders Supply, 64 Comp. Gen., supra (indicating that a bond may express the extent of liability as either a specific amount or a percentage of the bid price). Since the specified penal amount also was not sufficient to protect the government by establishing the surety's liability for at least the amount between Mistick's low bid and the next lowest acceptable bid, see FAR, 48 C.F.R. § 28.101-4(b), the agency properly rejected the bid as nonresponsive.

While Mistick and the surety may have intended to comply with the invitation's bid guarantee requirement, we point out that a nonresponsive bid may not be corrected to reflect such intentions on the basis of extrinsic evidence, outside of the bid. See Hydro Dredge Corp., B-214408, supra.

The protest is dismissed. See 4 C.F.R. § 21.3(f) (1985).



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